(13)

No. 93-397

Supreme Court, U.S.
FILED
MAR 14 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ASSOCIATED INDUSTRIES OF MISSOURI
and
ALUMAX FOILS, INC.,
Petitioners,

v.

JANETTE M. LOHMAN, Director of Revenue,
and
DELONG'S, INCORPORATED, THE CITY OF BLUE SPRINGS,
GARY MARKENSON, THE MISSOURI ASSOCIATION OF COUNTIES,
THE MISSOURI MUNICIPAL LEAGUE, and
THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI,
Respondents.

On Writ of Certiorari to the Supreme Court of Missouri

PETITIONERS' REPLY BRIEF

THOMAS C. WALSH
(Counsel of Record)
JUAN D. KELLER
MICHAEL G. BIGGERS
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, Missouri 63102-2750
(314) 259-2000

Attorneys for Petitioners

BRYAN CAVE
Of Counsel

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

25 pp

TABLE OF CONTENTS

	Page
Table of Authorities	i
Introduction	1
ARGUMENT	6
I. THE ADDITIONAL 1.5% STATE-WIDE USE TAX IMPOSED BY §144.748 DISCRIMINATES ON ITS FACE AGAINST INTERSTATE COMMERCE AND CANNOT BE JUSTIFIED AS "COMPLEMENTARY" TO LOCAL SALES TAXES IMPOSED AT DIFFERENT RATES IN DIFFERENT PARTS OF THE STATE	6
II. A FINDING THAT THE ADDITIONAL USE TAX IS DISCRIMINATORY ENDS THE CONSTITUTIONAL INQUIRY	14
III. GENERAL AMERICAN TANK CAR CORP. v. DAY, 270 U.S. 367 (1926), DOES NOT CONTROL THIS CASE	16
IV. PETITIONERS HAVE STANDING TO CHALLENGE THE USE TAX	19
CONCLUSION	20

TABLE OF AUTHORITIES

Page(s)

Cases

Amerada Hess Corp. v. New Jersey Div. of Taxation, 490 U.S. 66 (1989) 13

Armco, Inc. v. Hardesty, 467 U.S. 638 (1984) 12

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 5,11

Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977) 7,10,18,20

Chemical Waste Management v. Hunt, ___ U.S. ___, 112 S. Ct. 2000 (1992) 15

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 10

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 15

D.H. Holmes Co., Ltd. v. McNamara, 486 U.S. 24 (1988) 7

Dennis v. Higgins, 498 U.S. 439 (1991) 7

Dunbar-Stanley Studios, Inc. v. Alabama, 393 U.S. 537 (1969) 12

Felt & Tarrant Co. v. Gallagher, 306 U.S. 62 (1939).... 16

General American Tank Car Corp. v. Day, 270 U.S. 367 (1926) 16,17,18

Halliburton Oil Well Cementing Co. v. Reilly, 373 U.S. 64 (1963) 8,9,14,17,18

Harper v. Virginia Dep't of Taxation, ___ U.S. ___, 113 S. Ct. 2510 (1993) 18

Henneford v. Silas Mason Co., 300 U.S. 577 (1937) 5,8,9,17

James B. Beam Distilling Co. v. Georgia, ___ U.S. ___, 111 S. Ct. 2439 (1991) 18

Kraft General Foods, Inc. v. Iowa Dep't of Revenue & Finance, ___ U.S. ___, 112 S. Ct. 2365 (1992) 9,14

Maryland v. Louisiana, 451 U.S. 725 (1981) 5,10

Minneapolis Star & Tribune Co. v. Minnesota Comm'n of Revenue, 460 U.S. 575 (1983) 12

Nippert v. City of Richmond, 327 U.S. 416 (1946) 13

Phillips v. Oklahoma Tax Commission, 577 P.2d 1278 (Okla 1978) 4

Quill Corp. v. North Dakota, ___ U.S. ___, 112 S.Ct. 1904 (1992) 13

R&M Enterprises, Inc. v. Director of Revenue, 748 S.W.2d 171 (Mo. banc 1988) 4

Southwestern Bell Tel. Co. v. Morris, 345 S.W.2d 62 (Mo. banc 1961) 7

Travellers' Insurance Co. v. Connecticut, 185 U.S. 364 (1902) 18

Welton v. Missouri, 91 U.S. 275 (1875) 6

Constitutional Provisions and Statutes

Missouri Constitution, Article X, §22(a) 3

§144.747, RSMo (Repealed) 2,3,15

§144.748, RSMo ..... *passim*

Other Authorities

Blumstein, Some Intersections of the Negative Commerce Clause and the New Federalism: The Case of Discriminatory State Income Tax Treatment of Out-of-State Tax-Exempt Bonds, 31 Vand. L. Rev. 473 (1978) 15

Hartman, Federal Limitations on State and Local Taxation (1981) 18

Hellerstein, Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination, 39 Tax Lawyer 405 (1986) 13,17,18

Warren & Schlesinger, Sales and Use Taxes: Interstate Commerce Pays Its Way, 38 Colum. L. Rev. 49 (1938) 7

Webster's Third New International Dictionary (1967) 8

No. 93-397

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ASSOCIATED INDUSTRIES OF MISSOURI
and
ALUMAX FOILS, INC.,
Petitioners,

v.

JANETTE M. LOHMAN, Director of Revenue,
and
DELONG'S, INCORPORATED, THE CITY OF BLUE SPRINGS,
GARY MARKENSON, THE MISSOURI ASSOCIATION OF COUNTIES,
THE MISSOURI MUNICIPAL LEAGUE, and
THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI,
Respondents.

On Writ of Certiorari to the Supreme Court of Missouri

PETITIONERS' REPLY BRIEF

Introduction

We will not attempt to respond individually to the five overlapping briefs filed by respondents and their *amici* but will confine our reply to those points most germane to the Court's

consideration of the issues in this case.[1] At the outset, several general observations are in order.

1. The array of state and local taxing units and their trade associations who have lined up in support of the Missouri taxing structure leaves no doubt that state and municipal officials view this case as a potential wedge to pry open the door that has heretofore been shut to any sales/use tax scheme that does not treat local commerce and interstate commerce equally. The briefs of respondents and their *amici* represent an undisguised plea to allow states to experiment with taxing systems that do not achieve true parity between local and interstate commerce.[2]

Until now, a use tax that was not identical to a sales tax imposed on an identifiable corresponding transaction has not passed constitutional muster. Every state except Missouri seems to understand what is required by the Commerce Clause and has taken the steps necessary to make sure that any local use tax is paired with the corresponding local sales tax. Missouri enacted a statute in 1990 which gave each locality the option of enacting a use tax equivalent to any local sales tax (§144.747), but scuttled that arrangement in favor of the mandatory additional use tax

---

[1] The Brief of Respondent Janette Lohman will be referred to as "Resp. Br."; the Brief of Intervenors-Respondents DeLong's, Incorporated, *et al.*, as "DeLong Br."; the *Amicus* Brief of The National Conference of State Legislatures, *et al.*, as "NCSL Br."; the *Amicus* Brief of The Multistate Tax Commission as "MTC Br."; and the *Amicus* Brief of the City of St. Louis and eleven other Missouri municipalities as "Cities' Br."

[2] Perhaps the most candid acknowledgment of the true motive of our adversaries appears at page 3 of the *amicus* brief of the Multistate State Tax Commission, where that body states that its mission is "to promote and support appropriate state efforts to innovate and develop more sophisticated and efficient methods of taxing interstate businesses . . .."

enacted at the state level in 1991 for the benefit of local counties and municipalities.[3]

2. Respondents and their *amici* claim that the sovereignty of local governmental units is at stake and accuse petitioners of asking this Court to usurp local electorates' right to impose sales taxes through "local democratic decisionmaking" (NCSL Br. 2; DeLong Br. 24-25). And in seeking this Court's blessing for a system that tolerates wild discrepancies between sales and use tax rates, respondents suggest that "the claimed unevenness in treatment is a function of varying local tax rates" and that equality is "impossible" (DeLong Br. 44, 8). Both arguments are misconceived.

The State of Missouri, not petitioners or this Court, has preempted "local democratic decisionmaking" by imposing the additional 1.5% state-wide use tax for the benefit of local taxing districts, thereby foreclosing voters from even considering the issue of local use taxes. Indeed, one of the apparent purposes for utilizing this mechanism was to obviate a vote of the local citizenry on the use tax, despite the mandate of Article X, §22(a) of the Missouri Constitution requiring local voter approval as a precondition to the levy of any such taxes.[4]

And the "unevenness" in treatment exists precisely because the State has allowed localities to adopt local sales taxes but has

---

[3] The now-repealed §144.747 provided: "Other provisions of law notwithstanding, whenever a political subdivision is authorized to levy a sales tax, the political subdivision shall also be authorized to levy a use tax at the same rate which shall be applied in the same manner as the state use tax pursuant to this chapter" (S.L.F. 44).

[4] The General Assembly anticipated a challenge to this disenfranchisement by stipulating in §144.748(9) that the voters would have a chance to consider the additional use tax "... only in the event that a final decision of a court of competent jurisdiction holds that the provisions of this section require voter approval."

arrogated to itself the function of fixing the additional use tax. The State is the architect of its own constitutional predicament and cannot bootstrap itself into the argument that it lacks the ability to create a true "compensating use tax" at the state-wide level and that therefore "'absolute equality' ... cannot be attained" (DeLong Br. 23).

3. The State announces that "No 'better' alternatives have been suggested" (Resp. Br. 28), but Missouri stands alone in its inability to conform its sales/use tax system to the plain dictates of the Commerce Clause. None of the other 28 states that authorize local use taxes allow them to exceed the local sales tax within the same taxing jurisdiction (JA 35, ¶15). Footnote 16 of our opening brief indicates that these other sovereigns deal with the issue either by fixing both the sales and use taxes on a state-wide basis or by requiring them to be linked if and when enacted at the local level. Missouri, having adopted and then repealed such a system, is currently unique in its disregard for traditional notions of sales and use tax parity.[5] But other states and trade groups are obviously waiting in the wings to leap through any loopholes that might lurk in the Court's opinion in this case.

4. Respondents repeatedly protest that use taxes are not "protectionist," but their own articulation of the purpose of use taxes falls squarely within the definition of protectionism. The Missouri Supreme Court has said that the purpose of its use tax is "to protect Missouri revenue and Missouri sellers against competition from out-of-state sellers by removing any advantage which might be gained by making purchases outside the state..." *R&M Enterprises, Inc. v. Director of Revenue*, 748 S.W.2d 171, 172 (Mo. banc 1988). Without becoming enmeshed in a definitional debate, we would simply point out that

[5] An Oklahoma sales/use tax arrangement virtually identical to the present Missouri version was declared unconstitutional under the Commerce Clause in *Phillips v. Oklahoma Tax Commission*, 577 P.2d 1278 (Okla. 1978).

use taxes are inherently protectionist and *per se* discriminatory. They are not a charge for the use of the state's resources, facilities or services; nor are they exacted as a health or safety measure. Because of their distinctive character and function, use taxes have been upheld *only* when carefully crafted to *equalize* the burden between interstate and local commerce. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 581, 586 (1937); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270-73 (1984). That is the test the Missouri additional use tax flunks.

5. Respondents concede that there is no *de minimis* exception to the Commerce Clause (Resp. Br. 13; DeLong Br. 33). They also seem to agree that even if such an exception existed, it would be of no benefit to them in this case. Indeed, the additional 1.5% use tax is expected to generate between $60.8 million and $81.1 million in revenues during fiscal year 1994, including about $16 million to $21 million in areas of the state where the use tax exceeds the sales tax (see JA 75 and Petnr. Br. 18). Although respondents repeatedly emphasize that more than 90% of the sales subject to sales tax occur in locales where the sales tax is equal to or in excess of 5.725%, the more telling fact is that 26% of the state's residents live in the 841 taxing districts where the sales tax is less than 5.725% (JA 66, 104, 107). When those 1.3 million Missourians order or buy merchandise from out-of-state, they incur a higher use tax than the sales tax they would pay in their own town on the same items.

In any event, respondents acknowledge that if the Missouri system is deemed discriminatory, it cannot be salvaged on a *de minimis* theory. This concession is, of course, required by this Court's rule that "We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." *Maryland v. Louisiana*, 451 U.S. 725, 760 (1981).

ARGUMENT

I. THE ADDITIONAL 1.5% STATE-WIDE USE TAX IMPOSED BY §144.748 DISCRIMINATES ON ITS FACE AGAINST INTERSTATE COMMERCE AND CANNOT BE JUSTIFIED AS "COMPLEMENTARY" TO LOCAL SALES TAXES IMPOSED AT DIFFERENT RATES IN DIFFERENT PARTS OF THE STATE.

The issue presented by this case is the constitutionality of §144.748, RSMo. This statute levies a 1.5% use tax over and above the state-wide sales tax and, by anyone's reckoning, therefore discriminates on its face against interstate commerce. A facial analysis of the state statutory scheme thus reveals that this case is nothing more than a functional rerun of *Welton v. Missouri*, 91 U.S. 275 (1875).

If respondents are to salvage the additional use tax under these circumstances, they must bear the burden of demonstrating that the tax is "complementary" to *some* sales tax. Our opening brief anticipated that effort— and responded to the Missouri Supreme Court's analysis of it— in light of the governing decisions of this Court. If this Court is to look for *a tax* that is "complementary" to the 1.5% additional use tax, where is it to be found? Obviously not at the state level. And if the Court looks at the local level, it will find 22 different local sales tax rates around the state ranging all the way from zero in 14 locales to 3.5% in one city (JA 67, 126-31).

Respondents have mischaracterized our discussion of this issue and have attempted to shift the focus from the constitutionality of §144.748 to the constitutionality of sales and use tax arrangements in particular cities and counties. That is not what this case is about. We have not engaged in a "transaction-by-transaction approach," as one *amicus* has labeled it (NCSL Br. 17), but rather have used appropriate examples to demonstrate that the patchwork pattern of varying local sales taxes cannot be deemed "complementary" to the uniform state-wide use tax.

Interstate commerce is not an ethereal abstraction; it takes form in the marketplace where commerce is transacted by real people buying and selling real goods and incurring real taxes. It was, after all, for their benefit that the Commerce Clause was enacted. *Dennis v. Higgins*, 498 U.S. 439, 449 (1991). As long ago as 1938, the necessity of examining the realities of the local marketplace was noted in WARREN & SCHLESINGER, SALES AND USE TAXES: INTERSTATE COMMERCE PAYS ITS WAY, 38 COLUM. L. REV. 49, 66 (1938), quoted with approval by the Missouri Supreme Court in *Southwestern Bell Tel. Co. v. Morris*, 345 S.W.2d 62, 67 (Mo. banc 1961):

> "In order that use taxes will not be held discriminatory against interstate commerce, it must be shown that there is an equivalent burden on the purchase of merchandise *locally*. For that reason, it is necessary to find a tax *on local purchases* supplementary to the use tax."[6]

Seemingly oblivious to the cases from this Court explaining the concept of and justification for "complementary" or "compensatory" use taxes, respondents superficially state that sales and use taxes are "the 'paradigm' of compensatory taxes" (Resp. Br. 27). Ultimately, though, they must recognize that no sales/use tax case has ever accepted their position that a uniform, fixed use tax rate can be deemed to "compensate" for an overall *average* of a hodge-podge of varying sales tax rates. Their argument for a rule based on state-wide "average" tax rates or on an analysis of state-wide "net burdens" is totally without precedent and reflects a misperception of the rationale underlying this Court's endorsement of use taxes that are truly "complementary." *See, e.g., D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24, 32 (1988) (use tax does not discriminate against interstate commerce because "[i]t is *equal* to the sales tax applicable to the same tangible personal property purchased in-state"); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 331

[6] Emphasis added here and throughout this brief except where otherwise indicated.

(1977) ("Equal treatment of interstate commerce ... has been the common theme running through the cases in which this Court has sustained 'compensating' state use taxes"); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 66 (1963) ("... [T]he purpose of such a sales-use tax scheme is to make all tangible property used or consumed in the State subject to a *uniform* tax burden irrespective of whether it is acquired within the State, making it subject to the sales tax, or from without the State, making it subject to a use tax *at the same rate*").

The dictionary definition of "complement" is "to fiil in or make up (what is lacking)"; and "compensate" means "to be equivalent to." *Webster's Third New International Dictionary*, pp. 464, 463 (1967). The use taxes that have been approved by this Court have literally "filled in" and "made up" for the gap created by the presence of a sales tax within the taxing jurisdiction and have supplied an "equivalent" levy. The seminal case of *Silas Mason*, 300 U.S. at 581, underscored the parity achieved between the local seller and his competitor by a truly compensatory tax:

> "One of its effects must be that *retail sellers* in Washington will be helped to compete upon terms of equality with *retail dealers* in other states who are exempt from a sales tax or any corresponding burden."

Later, in describing the complementary nature of the use tax, Justice Cardozo stressed the equal burdens imposed on nonresident goods and local goods:

> "In substance what [Washington] says is this: You may ship your goods in such amounts and at such prices as you please, but the *goods* when used in Washington after the transit is completed, will share an equal burden with *goods* that have been purchased here." *Id.* at 586.

So from the inception of the compensatory use tax doctrine, the equality of burdens on competing sellers and competing goods has been indispensable to validity. The Missouri scheme, which makes no effort to equalize the burden between the

foreign seller and his competing local counterpart or between foreign goods and competing local goods, simply does not involve a complementary tax. Indeed, in localities where more than 26% of Missourians live — a statistic which respondents conspicuously ignore— the 5.725% state-wide use tax exceeds the sales tax rate applicable in the same locale (JA 66); it does not "fill in or make up what is lacking."

Intervenor-Respondents acknowledge that out-of-state purchasing is "discouraged" when the would-be purchaser is confronted with a use tax that exceeds the corresponding sales tax (DeLong Br. 36). But a state has no constitutional power to use its taxing authority to "discourage" out-of-state purchasing. Nor can it discriminate against some segments of interstate commerce and seek absolution by reason of supposed favoritism accorded to other segments.

Use tax cases of a more recent vintage further undermine the State's argument based on "average" overall tax rates. *Halliburton* reinforced the doctrine of *Silas Mason,* re-emphasized the need for equal treatment, and again zeroed in on similarly-situated taxpayers and goods. Rejecting the claim that incidental discrepancies should be overlooked, the Court reiterated the rule that has always governed sales/use tax cases:

> "The conclusion is inescapable: *equal treatment for in-state and out-of-state taxpayers similarly situated* is the condition precedent for a valid use tax on goods imported from out-of-state." 373 U.S. at 70.

The *Halliburton* Court also observed that in determining whether taxes are truly complementary, the inquiry should focus on the "very in-state taxpayer who is most similarly situated ..." to the use tax payer. *Id.* at 71.[7] *Halliburton* discredits the

[7] To the same effect is *Kraft General Foods, Inc. v. Iowa Dep't of Revenue & Finance*, ___ U.S. ___, 112 S. Ct. 2365, 2371 n.23 (1992) ("In considering claims of discriminatory taxation under the Commerce Clause, however, it is necessary to compare the taxpayers who are 'most similarly situated.'")

contention (Cities' Br. 15) that use tax payers *as a statewide class* may be compared to sales tax payers *as a statewide class*. The Court's insistence on comparing only the most similarly situated tax payers is inconsistent with respondents' approach, which disregards the dramatic differences in tax consequences flowing to various members of the purported classes. Respondents' global, generic vision of commerce completely depersonalizes the inquiry and violates the principle that "all objects of interstate trade merit Commerce Clause protection...." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978).

Respondents' reliance on overall rough, average approximations likewise runs headlong into *Maryland v. Louisiana*, 451 U.S. 725 (1981), where the Court used as an example of a truly compensating tax a use tax which imposes a "tax on a substantially equivalent event to assure uniform treatment of goods and materials to be consumed in the state." *Id.* at 759. Obviously, goods should be compared to goods against which they are competing, not against goods being sold 200 miles away. For 1.3 million Missouri citizens, goods coming from out-of-state are subject to a higher use tax than the sales tax on goods sold locally, and that difference does not "compensate" for anything.

In *Boston Stock Exchange*, the Court unanimously struck down a state statute labeled "compensatory legislation" enacted to "neutralize" the competitive advantage conferred on business transactions outside the state. 429 U.S. at 330. Because of the tax differential, a given resident purchaser would have received an economic advantage by engaging in a local transaction. Dismissing the argument that the taxes were "complementary," Justice White looked at the choice facing the in-state purchaser and summarized the underpinnings of the "complementary" tax doctrine:

> "In all the use tax cases, an individual faced with the choice of an in-state or out-of-state purchase could make that choice without regard to the tax consequences. If he purchased in State, he paid a sales tax; if he purchased out of State but carried the article back for use in State, he paid a use tax *of the same amount*. The taxes treated both transactions in the same manner." *Id.* at 332.

Similarly, in *Bacchus Imports*, 468 U.S. at 268 n.8, the Court once again used language incompatible with respondents' reliance on overall revenues or average tax rates:

> "Our cases make clear that discrimination between in-state and out-of-state *goods* is as offensive to the Commerce Clause as discrimination between in-state and out-of-state *taxpayers*."

Whether the comparison is between interstate and local sellers, goods, taxpayers or purchasers, there can be no realistic contention that the tax treatment accorded them is "complementary" unless they are similarly situated and treated equally. Adoption of a rule permitting wide fluctuation in sales/use tax differentials at the local level as long as the overall "average" sales tax rate exceeds the "average" use tax rate would encourage the development of taxing schemes that would seriously disrupt the competitive balance that the rule of equality has historically achieved.

Measuring constitutionality by reference to "average" rates is also rife with the potential for abuse and controversy. In the instant case, of course, the "average" use tax rate is fixed by a uniform state-mandated levy. But respondents' theory of "complementary" taxes would also authorize individual taxing districts to adopt local sales and use tax rates that have absolutely no relationship to each other as long as the state "average" sales tax exceeds the state "average" use tax, however calculated.

Aside from the obvious opportunity for bias against interstate commerce facilitated by any scheme based on "average" rates, a comparison between "average" sales tax rates and "average" use tax rates would require the examiner to shoot at a constantly moving target and inevitably would foster creative methods of

calculating those "averages."[8] Since sales and use tax rates are constantly changing, a retroactive constitutional analysis would need to be made every year, thereby inevitably increasing the amount of litigation over the issue. Respondents' characterization of their proposed Commerce Clause test as establishing a "bright line" (Resp. Br. 43) is thus fanciful.

As a variation on their main theme urging a comparison of "average" rates, respondents also repeatedly trumpet the fact that more sales tax dollars than use tax dollars are currently collected state-wide, and they simplistically cling to the view that this somehow proves that the sales/use tax system actually favors interstate commerce. As noted above, this would be accurate and relevant from a constitutional viewpoint only if the taxes being analyzed were truly complementary to each other. This Court has repeatedly explained that a greater tax burden on local citizens does not justify discrimination against interstate commerce unless the taxes are in fact complementary — *i.e.*, they are imposed on "substantially equivalent events." *See ,e.g.*, *Armco, Inc. v. Hardesty*, 467 U.S. 638, 643 (1984); *Minneapolis Star & Tribune Co. v. Minnesota Comm'n of Revenue*, 460 U.S. 575, 588 (1983).

Respondents' invocation of *Dunbar-Stanley Studios, Inc. v. Alabama*, 393 U.S. 537 (1969), which dealt with a license tax imposed on photographers, does not further their cause. A photographer at a fixed location paid a maximum tax of $25 per year,

[8] For instance, does the "average" sales-tax rate refer to the mean, the mode, the median, or the most prevalent? More taxing districts in Missouri (409) have an overall sales tax rate of 4.725% than any other single rate (JA 124, L.F. 583-91). If the arithmetic mean were calculated by multiplying the number of jurisdictions having each individual rate by their respective rates, the "average" sales tax rate would be less than the 5.725% state-wide use tax. The median sales tax rate among the 1573 Missouri jurisdictions is 5.225% (*see* JA 67, 119-25; L.F. 560-92).

Because respondents' theory would also countenance a wide range of use tax rates, similar disagreements would likely arise about the correct method of calculating the "average" use tax rate.

whereas transient photographers were charged $5 per week. The Court held that the tax did not discriminate against interstate commerce since it applied equally to *all* transient photographers, whether local or from out-of-state. *Dunbar-Stanley* has never been cited in any majority opinion of this Court, did not involve a use tax, and is of little aid to respondents.[9]

Respondents' repeated efforts to dress up their proposed standard of "average" or aggregate tax effects by claiming that Missouri's additional use tax does not place an "undue burden" on interstate commerce are equally unavailing. It is simply wrong to suggest that a tax is not discriminatory or protectionist unless it imposes a statistically "undue burden" on interstate commerce. As summarized in *Amerada Hess Corp v. New Jersey Div. of Taxation*, 490 U.S. 66, 75 (1989), the cases hold that a tax violates the Commerce Clause if, in the disjunctive, "it is facially discriminatory, has a discriminatory intent, *or* has the effect of unduly burdening interstate commerce." A single isolated remark in the "nexus" discussion in *Quill Corp. v. North Dakota*, ___ U.S. ___, 112 S.Ct. 1904, 1913 (1992), to which respondents repeatedly point (Resp. Br. 11, 17-18, 26; DeLong Br. 11-12), certainly did not upset this settled jurisprudence.

We have no quarrel with the general proposition that interstate commerce should pay its own way. But as this Court said in *Nippert v. City of Richmond*, 327 U.S. 416, 433-34 (1946), in words that could have been written for this case:

> "But this does not mean, and the trends do not signify, that the state or municipal governments may devise a tax appli-

[9] In HELLERSTEIN, COMPLEMENTARY TAXES AS A DEFENSE TO UNCONSTITUTIONAL STATE TAX DISCRIMINATION, 39 TAX LAWYER 405, 414-15 n.63 (1986), the author differentiates *Dunbar-Stanley* from sales/use tax cases and points out that the tax at issue there was "... arguably imposed on a nondiscriminatory class of activities ..." and that "the standard of equality to which the Court was holding the complementary levy may have been considerably more relaxed than the standard it would apply when faced with an apparently discriminatory levy."

cable to all commerce alike, which strikes down or discriminates against large volumes of that commerce in order to reach other portions as to which the application of the tax would produce no such consequences or only negligible ones. Other types of tax are available for reaching both portions which do not involve the forbidden evils or the necessity for putting them upon some commerce in order to reach other."

II. A FINDING THAT THE ADDITIONAL USE TAX IS DISCRIMINATORY ENDS THE CONSTITUTIONAL INQUIRY.

Although intervenors made an effort below to defend the Missouri additional use tax on the basis of "administrative convenience," the State here wisely disassociates itself from any such assertion: "Nor does Respondent here attempt to 'justify' the additional use tax on 'administrative convenience' grounds" (Resp. Br. 14). This concession obviously recognizes the unavailability of such a defense under, *inter alia*, *Halliburton* and *Kraft General Foods*.

Elsewhere in its brief, though, the State maintains that "No 'better' alternatives have been suggested" (Resp. Br. 28). The unstated assumption of this declaration apparently is that if the state-wide use tax is discriminatory, it might be saved if it is deemed the "least discriminatory alternative." *Amicus* Multistate Tax Commission (MTC Br. 16-22) makes a similar point more overtly, arguing for a "balancing test." These contentions erroneously interject concepts designed for evaluating police-power measures into this use tax case.

The standard for analyzing a discriminatory tax law has been succinctly stated by Professor Blumstein:

> "The antidiscrimination principle emerges as one of the few certain precepts in the constitutional review of state taxation legislation ....
>
> "In a tax case, discrimination, by itself, appears sufficient to justify invalidation because other, non-discriminatory

> means of raising revenue or of providing economic incentives are readily available."[10]

Likewise, in *Chemical Waste Management v. Hunt*, ___ U.S. ___, 112 S. Ct. 2000, 2014 (1992), the Court summarized the rule that is particularly apropos of a use tax: "Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry."

The Missouri use tax has only two purposes: To protect local merchants and to raise revenue. Unless it does the latter equally, it may not do the former. If a use tax discriminates against interstate commerce, it is by definition not the "least discriminatory alternati· " There is *always* one simple constitutional alternative: el.minate the discrimination. No "balancing" or search for "better alternatives" is necessary or appropriate.

The State's discussion of other "alternatives" eventually dissolves into a complaint that nondiscriminatory "solutions" would "usurp" states' powers to allocate tax burdens within their borders and might result in less tax revenue (Resp. Br. 30-31). A state's power to tax interstate commerce must be exercised within the parameters spelled out in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The nondiscrimination prong of *Complete Auto* is the easiest to satisfy — at least in the context of a use tax — and the State should not be heard to complain that compliance with the plain dictates of the constitution is inconvenient or inimical to revenue enhancement.

The State's position that it has done the best it could is difficult to fathom. By repealing the even-handed §144.747 and replacing it with the discriminatory §144.748, Missouri created a

---

[10] BLUMSTEIN, SOME INTERSECTIONS OF THE NEGATIVE COMMERCE CLAUSE AND THE NEW FEDERALISM: THE CASE OF DISCRIMINATORY STATE INCOME TAX TREATMENT OF OUT-OF-STATE TAX-EXEMPT BONDS, 31 VAND. L. REV. 473, 512, 518 (1978).

problem that need never have arisen.[11] The 15 states listed in footnote 16 of our main brief have adopted complementary use tax schemes that have produced both the desired revenue and the desired protection of local businesses without crossing the bright line drawn in the sand by the Commerce Clause.[12]

III. *GENERAL AMERICAN TANK CAR CORP. v. DAY*, 270 U.S. 367 (1926), DOES NOT CONTROL THIS CASE.

Fueled by the Missouri Supreme Court's heavy reliance on *General American*, all respondents and their *amici* urge this Court to breathe new life into that decision in the sales/use tax context, where it has been moribund. It is curious that, if *General American* were truly relevant as a use tax precedent or as a complementary tax case, it has not been mentioned in any of this Court's decisions since 1937. In fact, it is not relevant for the reasons already set forth in our principal brief, in the *amicus* brief of the Washington Legal Foundation and in the dissenting opinion of Chief Justice Robertson in the Missouri Supreme Court. Most importantly, *General American* simply was not a

---

[11] Nor can Missouri claim that it naively enacted §144.748 in the full expectation that it met constitutional strictures. The fiscal note submitted to the General Assembly in connection with its consideration of the additional use tax warned that the State "anticipates litigation resulting from this proposal" (JA 74).

[12] Though having disavowed any reliance on "administrative convenience," the State suggests in footnote 34 (Resp. Br. 29) that out-of-state vendors would have an increased burden in complying with a nondiscriminatory use tax. We have three observations: (1) No such burdens have overcome the other state systems which pair local sales and use taxes, and interstate vendors are presumably accustomed to complying with such requirements; (2) record keeping, collection and remittance burdens do not constitute a legal defect in a taxing statute, *Felt & Tarrant Co. v. Gallagher*, 306 U.S. 62 (1939); and (3) out-of-state vendors required to collect the use tax would have the requisite nexus to Missouri and thus would have access to local sales tax rates, which could be used to ascertain the corresponding (and equal) local use tax rate.

use tax case and was decided before the modern concept of complementary taxes was developed and took on full form. In analyzing the "in lieu" tax at issue there under the "fairness and reasonableness" standards of the Equal Protection Clause, the Court faced a considerably different task than that presented by an allegedly compensatory use tax required to meet the "strict rule of equality" adopted in *Silas Mason* and reaffirmed in *Halliburton*.

The *General American* Court was examining a tax on property, which was not discriminatory on its face. Under those circumstances, a rough equivalence might pass Fourteenth Amendment scrutiny — especially where a determination of precise equality might be difficult. But it requires no special acumen to analyze a use tax to see whether it is equal to a corresponding sales tax for which it is supposed to compensate. There is no room for play in the joints between sales and use taxes — nor should there be. Part of the Court's impetus in *General American* also may have stemmed from the facts (a) that the discrepancy between in-state and out-of-state taxpayers appeared to be transitory because it existed for only one year, and (b) that the non-resident corporations could "opt out" of the tax by becoming domiciled in a parish and paying the local tax.

As Professor Hellerstein has counselled, "The standard of equality that the Court applies to states in evaluating their complementary tax schemes should reflect the level of scrutiny that the Court ordinarily employs for state taxes under the particular constitutional provision at issue." HELLERSTEIN, COMPLEMENTARY TAXES, 39 TAX LAWYER at 463. The author refers to *General American* as an example of "... the broad 'fairness and reasonableness' standard" of the Equal Protection Clause being applied "indiscriminately" to compensatory taxing schemes challenged under the Commerce Clause. *Id.*

The State urges that *General American* should not be overruled or, alternatively, that it be overruled prospectively (Resp. Br. 39-43 & n.48). Neither action is necessary here; *General*

American is simply inapplicable to the Missouri sales/use tax scheme. Indeed, if the decision of the Missouri Supreme Court were to be affirmed, it would be necessary for this Court to overrule, at least in part, *Halliburton* and *Boston Stock Exchange*, among others.[13]

Respondents also rely on *Travellers' Insurance Co. v. Connecticut*, 185 U.S. 364 (1902), which involved taxation on shares of stock. Like *General American*, it is from an earlier era when use taxes were an unknown phenomenon. Furthermore, it was examined under then-existing interpretations of the Privileges and Immunities Clause, where a "substantial equality of tax treatment between residents and nonresidents seems to be enough to satisfy..." the constitutional requirements. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION, §4.3, p. 176 (1981). The Court observed the differing burdens and tax status as between resident and nonresident stockholders, and the fact that those burdens varied from year to year. It remarked that "absolute equality in taxation can never be obtained. That system is the best which comes the nearest to it." *Id.* at 371. The tax in question was deemed "the nearest" to equality that could be obtained under the circumstances. Such a holding does not reflect Commerce Clause doctrine and, even assuming otherwise, does not authorize mere approximations in the sales/use tax field, where the "nearest" to equality is equality in fact — a readily achievable goal.[14]

---

[13] Of course if the Court does decide to overrule *General American*, the State's request that such overruling be prospective only is contrary to *James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111 S. Ct. 2439 (1991), and *Harper v. Virginia Dep't of Taxation*, ___ U.S. ___, 113 S. Ct. 2510 (1993).

[14] Professor Hellerstein has questioned whether *Travellers'* would be decided the same way today under "... the Court's modern view of the privileges and immunities clause..." which embodies "... a more rigorous standard of scrutiny ...." HELLERSTEIN, COMPLEMENTARY TAXES, 39 TAX LAWYER at 429 n. 173.

IV. PETITIONERS HAVE STANDING TO CHALLENGE THE USE TAX.

The National Conference of State Legislatures, *et.al.*, purport to challenge, as *amici*, petitioners' standing in this Court (NCSL Br. 8-15). Their argument, to the extent it is anything other than a restatement of their position on the merits, rests entirely on a mischaracterization of the issue raised by petitioners. Both here and below, petitioners have made a facial challenge to the Missouri additional use statute (§144.748) in its entirety. *See* Pet. Apdx. A-1; *see also* JA 9; Petnr. Br. 15-22. The suggestion that petitioners have "implicitly conceded" that the additional use tax statute is unobjectionable in certain local jurisdictions (NCSL Br. 11) is inaccurate. And there is certainly no gap or supervening cause in the link between the additional use tax statute and petitioners' injury. The happenstance of what local taxing jurisdictions may do (*see* NCSL Br. 12 n.4) does not alter petitioners' injury and is not an element of their claim.

The 1.5% additional use tax is imposed by state statute and is applicable in every city and county to every interstate sales transaction. So anyone who is required to collect use taxes — as well as anyone who is required to pay them — is injured because the discriminatory feature of the additional use tax renders it invalid on its face in all its applications. Therefore, anyone who has paid a use tax under the present statutory scheme has necessarily paid the offending 1.5% component thereof and has standing to assert its unconstitutionality. Petitioners are plainly within that group, for it was stipulated in the trial court that "Compliance with §144.748 will impose significant economic costs upon AIM's members and Alumax," including "... the payment of such tax...." (JA 34, ¶8).

As purchasers in interstate transactions, Alumax and various members of AIM pay Missouri use tax, including the additional use tax, on tangible personal property purchased outside of

Missouri (JA 33, ¶4). Alumax's monthly use-tax bill runs about $3,000 (*id.* ¶5). Several members of AIM also have standing as out-of-state vendors because they collect and remit Missouri use taxes on sales of personal property made by them from outside Missouri to purchasers within the state (*id.* ¶4). These stipulated facts establish that petitioners have suffered an injury in fact to an interest within the zone of interests protected by the Commerce Clause. *E.g.*, *Boston Stock Exchange*, 429 U.S. at 320 n.3.

CONCLUSION

The Missouri additional use tax imposed by §144.748, RSMo, fails the bright-line test of equality that has been applied in all of this Court's use tax cases. Section 144.748 discriminates against interstate commerce and is therefore repugnant to the Commerce Clause. The judgment of the Supreme Court of Missouri should be reversed.

Respectfully submitted,

THOMAS C. WALSH
(Counsel of Record)
JUAN D. KELLER
MICHAEL G. BIGGERS
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, Missouri 63102
(314)259-2000
Attorneys for Petitioners

BRYAN CAVE
Of Counsel

March 1994